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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

H.M.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062354

(San Diego County
Super. Ct. No. SJ12518C)

PROCEEDINGS for extraordinary relief after reference to a Welfare and

Institutions Code¹ section 366.26 hearing. Laura J. Birkmeyer, Judge. Petition denied;
request for stay denied; motion to correct the record granted.²

¹ All further statutory references are to the Welfare and Institutions Code.

H.M. seeks writ review of orders terminating her reunification services and setting a section 366.26 hearing regarding her son, C.U. She contends the evidence is insufficient to support the juvenile court's finding it would be detrimental to C.U. to return him to her custody, and the court's finding that reasonable services were provided. She also contends she did not receive effective legal representation. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

H.M. and her three children, six-year-old C.U. and his older sisters, Karla M. and S.M., came to the United States from Mexico with H.M.'s husband, Samuel M., who was in the process of seeking United States legal residency for the family.

In March 2011, there were allegations that Samuel had sexually abused Karla and S.M. H.M. did not believe the allegations and Samuel denied them. The Agency petitioned on behalf of Karla and S.M. under section 300, subdivision (d), and on C.U.'s behalf under section 300, subdivision (j). Only C.U. is the subject of this writ petition.

The Agency learned that Samuel had been subjecting C.U. to severe discipline by hitting him with a belt, hitting him on the head with his bare knuckles and placing him in a closet for long periods of time. The Agency filed an amended petition on C.U.'s behalf under section 300, subdivision (i), alleging Samuel had subjected him to acts of cruelty. At the jurisdictional and dispositional hearing in July 2011, the court found true the allegations under section 300, subdivision (d), concerning Karla and S.M. and under

² We grant the motion of the San Diego County Health and Human Services Agency (the Agency) to correct the writ record by including the May 1, 2012, permanency review report and the social worker's resume.

section 300, subdivision (i), concerning C.U., and dismissed the allegations under section 300, subdivision (j). The court declared the children dependents of the juvenile court, removed them from H.M.'s care and ordered them placed in foster care. This court affirmed the orders. (*In re C.U.* (Mar. 13, 2012, D060536) [nonpub. opn.].)

For the six-month review, social worker Liliana Iribe-Moreno reported that H.M. was having regular visitation with C.U., but had told the social worker she was waiting for the results of her appeal from the dispositional hearing before deciding whether to begin other services. She said she did not need the services and Samuel was innocent. H.M. disagreed with the way her court-appointed attorney was handling the case and she expressed frustration that she was expected to pay for her counsel and for services she could not afford. In January 2012, on H.M.'s motion, the court held a *Marsden* hearing³ and granted H.M.'s motion to represent herself. Responding to H.M.'s concern about paying for services, it ordered collection of any reimbursable costs be suspended until further order of the court.

At the six-month review hearing in March 2012, the court heard testimony from the social worker. After considering the evidence and argument by counsel, the court found it would be detrimental to return C.U. to H.M.'s custody, and reasonable services had been offered or provided, but H.M. had not made substantial progress in her services plan. It ordered C.U. be continued as a dependent child in foster care and ordered six more months of reunification services.

³ *People v. Marsden* (1970) 2 Cal.3d 118.

At the 12-month hearing, in July 2012, social worker Aurea Rodriguez testified H.M. had completed parenting classes, attended supervised visits, received supervised telephone calls and had begun sexual abuse therapy for nonprotective parents and individual therapy in April. The social worker said the therapists reported H.M. continued to deny that Samuel had abused her children. She also said neither the sexual abuse therapist nor any of the other service providers required direct payment from H.M.

After receiving additional evidence and argument by counsel, the court found returning C.U. to H.M.'s custody would create a substantial risk of detriment to his well-being. The court found C.U. had been abused, and H.M. had not been able to protect him. It found the Agency had provided reasonable services that were not predicated on H.M.'s ability to pay, but she had not made substantive progress with the provisions of her case plan. The court terminated her reunification services and set a section 366.26 hearing.

H.M. petitions for review of the court's orders. (§ 366.26, subd. (I); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

I

H.M. contends the evidence was insufficient to support the court's finding that C.U. would be at substantial risk of detriment were he returned to her care.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-

1037.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also ' . . . view the record in the light most favorable to the orders of the juvenile court.' " (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) A reviewing court will not disturb a court's ruling in a dependency proceeding " ' "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

At the 12-month hearing the court will order the child returned to the parent's physical custody unless it finds that return would create a substantial risk of detriment to the safety, protection, or emotional well-being of the child. The court also determines whether reasonable services designed to aid the parent to overcome the problems that led to the child's removal have been provided or offered to the parent. (§ 366.21, subd. (f).) A parent's failure to participate regularly in a court-ordered treatment program is prima facie evidence that returning a child to the parent's care would be detrimental. (§ 366.21, subds. (e) & (f).)

The court had ordered H.M. to participate in therapy in July 2011. However, she delayed in starting sexual abuse therapy for nonprotective parents and individual therapy until April 2012. She continued to deny that Samuel had sexually abused Karla and S.M. and subjected C.U. to cruel treatment. H.M.'s individual therapist and the sexual abuse therapist both reported H.M. was in the beginning phases of therapy. The social worker expressed concern for C.U.'s safety if he were returned to H.M.'s care in that H.M. had not acknowledged the abuse to which Samuel had subjected C.U., showed no insight into

the abuse and continued to blame Karla and S.M. for the allegations. Substantial evidence supports the court's finding that returning C.U. to H.M.'s care would create a substantial risk of detriment to him.

II

H.M. asserts C.U.'s case plan was not specifically designed for C.U. and his needs because it was for all three children, and the social workers never tailored an individual plan for him. Assuming without deciding that H.M. has standing to raise issues concerning C.U.'s services plan, his case plan was sufficiently fashioned for his needs to constitute a reasonable plan for him. The court found Samuel had subjected C.U. to acts of cruelty, and H.M. did not protect him from this abuse when she knew or should have known about Samuel's cruel acts. C.U. reported Samuel and H.M. hit him, sometimes with a belt, and Samuel rapped him on his head with his bare knuckles and punished him by putting him in a dark closet for long periods. If he left the closet, he would be made to stay inside longer. He said he was afraid of ghosts and there were ghosts in the closet and a doll in there, which scared him. Because C.U.'s sisters had been subjected to sexual abuse, sexual abuse therapy was ordered for them. To help C.U. deal with the trauma to which he had been subjected, the court ordered him to participate in individual counseling. C.U. was participating in the therapy the court had ordered. He was provided with a reasonable services plan.

III

H.M. argues she was not provided with reasonable services and barriers were put in her way to prevent her from participating in her services plan. She claims the Office of

Revenue and Recovery harassed her by stating the county could seek reimbursement for attorney fees and services, and the social worker demeaned her by suggesting she could separate from Samuel and support herself and her children by begging or selling chocolate at the trolley station. She complains the social worker did not adequately communicate with her, and the Agency did not assist her in enrolling in programs. She notes her case plan did not include a requirement that she leave Samuel and move out of their home.

First, as to the social worker suggesting to H.M. that she could support herself and her children by begging or selling chocolate at the trolley station, we agree that comments such as this are inappropriate and counterproductive to the issues at hand. However, H.M. has not shown she was not provided or offered reasonable services. At the time the children were first taken into protective custody, Iribe-Moreno met with H.M. and explained how to arrange visits with the children and provided information about resources in her area. Iribe-Moreno explained H.M. would be provided with 12 months of reunification services for her to show she was able to protect her children and be a safe parent. Iribe-Moreno provided further information about voluntary services to H.M., but H.M. said she could not take time off from her job for the class Iribe-Moreno suggested and asked her to find a different class.

Iribe-Moreno reminded H.M. to make an appointment for a nonprotecting parenting group and referred her to the Parent Partner program. A parent mentor from this program reported H.M. was resistant and difficult to engage and said her goal was to

prove the children were lying. The mentor closed the referral, and H.M. told Iribe-Moreno she would wait to enroll in services only if the judge ordered her to do so.

Iribe-Moreno later reminded H.M. of the classes available and provided contact information for group therapy and told her the Agency had arranged to pay for this service. She provided referrals for domestic violence classes and for agencies that could assist H.M. in finding a home or shelter. Iribe-Moreno testified that she explained to H.M. the services that would be required as part of her services plan and explained the options that H.M. could pay for them or the county would pay and then might later bill her after the case was closed to recoup some of the costs, but that H.M. could request a waiver for those payments.

At the six-month hearing, H.M. was present with a Spanish language interpreter when the court discussed reimbursable costs and ordered the Office of Revenue and Recovery to suspend the collection of any reimbursable costs until further notice from the court. H.M. also was present with an interpreter when the court stated: "[H.M.] has indicated a concern that she does not have the resources to engage in services. The Agency is not requiring that she pay for services. They can make arrangement to do that. . . ."

Again at the 12-month hearing, there was evidence presented that H.M. was not being required to pay for services. The social workers' supervisor testified she had telephone conversations with H.M. and met with her in person to talk about bills H.M. had received. The supervisor said she told H.M. the Agency had submitted payment authorization for a program H.M. had asked about and she sent payment authorization for

H.M.'s therapist, and the therapist took full payment from the Agency for the therapy. The supervisor also said she had verified that another payment authorization had been sent at H.M.'s request. It was not H.M.'s inability to pay that prevented her from beginning therapy until late in the case, but her own resistance and unwillingness to start.

The services plan the Agency developed for H.M. was specifically tailored to address her needs. It included a therapy group to help her learn to protect her daughters from sexual abuse, parenting education classes to help her better care for her children and individual therapy with a Spanish speaking, culturally sensitive therapist to help her deal with how she had not protected Karla and S.M. from sexual abuse and C.U. from cruelty. Beginning in April 2012, she attended group sessions regarding her daughters' sexual abuse and had weekly individual therapy. From the beginning of the case, she had weekly, supervised visits with C.U. In addition, contrary to H.M.'s suggestion, there was no unwritten requirement that she leave Samuel and move out of their home. The services plan required her to "address any power and control issues in her relationship with [Samuel] and make a plan to safely and adequately parent her children."

The Agency assisted H.M. with services, informed her that she did not have to pay to begin services, submitted payment authorizations and continued to communicate with her on her progress. Substantial evidence supports the court's finding she was offered and provided reasonable reunification services.

IV

H.M. contends she received ineffective assistance of counsel. She argues her counsel in 2011 did not assist her in having documents received into evidence, did not

object to Agency's reports submitted for evidence, and did not want a contested hearing although H.M. wanted to have one. These arguments are not timely and are more properly brought through a petition for writ of habeas corpus. Moreover, even were we to consider her claims of ineffective assistance, we would decide they have no merit.

Section 317.5, subdivision (a), provides "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel." To establish that her counsel in dependency proceedings was ineffective, a parent " 'must demonstrate both that: (1) [her] appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates; and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent's] interests would have resulted.' " (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.) "A court need not evaluate whether counsel's performance was deficient before examining prejudice suffered by defendant. [Citation.] Thus, a court may reject a claim if the party fails to demonstrate that but for trial counsel's failings, the result would have been more favorable to the defendant." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.)

H.M.'s claims do not establish that her counsel's performance was deficient. As to her claim regarding a document she had prepared for the adjudication/disposition hearing in July 2011, counsel explained to her that the parties would have to receive the document before the court could read it. On the day of the hearing, counsel had not yet filed the document because other counsel were reviewing it that morning.

H.M.'s complaints that her counsel did not object to Agency's reports admitted into evidence during the adjudication/disposition hearing are also unavailing. The court had already received a document from H.M. that contained her objections and corrections to the reports. Further, counsel vigorously argued the allegations regarding Samuel's cruel actions toward C.U. were untrue, and the court should dismiss those allegations. The fact that the court ruled against these arguments does not show counsel was ineffective. H.M.'s argument regarding disagreement between her and her counsel about whether the court should hold a contested hearing is also misplaced. Counsel was obligated to give H.M. legal advice, complied with H.M.'s wishes and requested a contested hearing. Further, H.M. has not established she was prejudiced by any of her counsel's actions of which she now complains. She has not shown that she did not receive effective assistance of counsel.

Substantial evidence supports the court's findings and orders. H.M. has not shown she was denied due process and she has not shown ineffective assistance of counsel.⁴

⁴ The Agency requests we strike a letter from H.M.'s appellate attorney in her earlier appeal, which she has attached to her petition. This document is not properly before us, and, in any event, is not determinative to the outcome of the petition.

DISPOSITION

The petition is denied. The request for stay is denied.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.